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viz., of injury by the same act to two different articles belonging to the same person, only one action can be brought, seems entirely well settled: even though through ignorance or inadvertence the injury to the second chattel was not known to the plaintiff when the first suit was brought: *Folsom v. Clemence*, 119 Mass. 473; *Marble v. Keyes*, 9 Gray 221; *Bennett v. Hood*, 1 Allen 47; *Trask v. Hartford & New Haven Railroad Co.*, 2 Id. 331; *Herriter v. Porter*, 23 Cal. 385; *Braunenburgh v. Indianapolis Railroad Co.*, 13 Ind. 103; *Cumming v. Huines*, 5 Cal. 81.

If a man wrongly converts a thousand barrels of flour at one time, it would be monstrous to allow the owner to bring a thousand suits therefor: *Farrington v. Paine*, 15 Johns. 432. And see *O'Neal v. Brown*, 21 Ala. 482; *Hite v. Long*, 6 Rand. 457, and other cases.

And this is so even though the owner was prevented from including, in the first suit, all the articles taken or injured, by the fraudulent conduct of the defendant in refusing to allow him to examine the articles taken away in order to ascertain their number, or the amount of injury to each. The plaintiff in such case has only one "cause of action;" and the defendant does not attempt to conceal the cause of action, but only the extent and amount of the damage sustained by a well-known and understood cause. See *McCafferty v. Carter*, 125 Mass. 330.

And for a similar reason if A. steals

several articles from B. at one and the same time, he cannot be twice convicted and punished on two indictments, one for each article stolen. See Whart. Cr. Pl. & Pr., sect. 470; Whart. Cr. Ev., sect. 588, and cases cited in notes.

So, in the other instance above given, of injury to two parts of one's person, his leg and his arm, by one and the same blow, or by successive blows at one and the same assault, it is equally clear that but one action could be sustained, although the extent of the injury might not have been known when the first suit was brought: *Fetter v. Beale*, 1 Salk. 11; *Whitney v. Clarendon*, 18 Vt. 252; *Howell v. Goodrich*, 69 Ill. 556; *Read v. Great Western Railway Co.*, L. R., 3 Q. B. 555.

Why then, in case of injury to one's person and property by one and the same transaction, at one and the same time, as in the principal case, should a person be allowed two suits? Is there more than one cause of action in such case any more than in the others, where two actions are not allowed? It certainly seems that the reasoning of COLERIDGE, C. J., in the principal case, is more in harmony with the established rules of law. And it should be noted that the opinion of POLLOCK, B., and LOPES, J., in the court below, 11 Q. B. 712, were on the same side, so that really the majority of those judges who have expressed opinions on the subject are against successive actions in such cases.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Circuit Court, E. D. Arkansas.

SWANN v. SWANN.

Contracts made on the Lord's day are not void on religious or moral grounds, but upon the familiar and established doctrine that when a statute inflicts a penalty for doing an act—no matter what that act may be—a court of justice will not enforce a contract made in violation of such statute, and in the making of which

the parties to it incurred the prescribed penalty. A penalty implies a prohibition of the thing itself, on the doing of which the penalty is to accrue.

When, by the laws of a state, a large class of its citizens may lawfully labor and make contracts on the Lord's day, it is not, in a legal sense, against the public policy of such state, nor shocking to the moral sense of its people, for its courts to enforce a contract made on that day in another state, and valid by the law of that state.

A contract made on the Lord's day, and valid by the law of the state where made, will be enforced by the courts of another state, by the laws of which such contract would be void.

The only authentic and admissible evidence of the public policy of a state, on any given subject, are its constitution, laws and judicial decisions.

AT law.

Ratcliff & Fletcher, for plaintiff.

Clark & Williams, for defendant.

CALDWELL, J.—This suit is founded on a promissory note of which the defendant is the maker and the plaintiff the payee. The defence is that the note was executed on the Lord's day. The proof shows the note was executed on that day in the state of Tennessee, where the parties to it then resided, for the consideration of a valid pre-existing debt due from the defendant to the plaintiff. There is no place of payment fixed in the note.

In *Tucker v. West*, 29 Ark. 386, a note executed in this state on the Lord's day was held to be void under the statute. This court takes judicial notice of the laws of the several states: *Owings v. Hull*, 9 Pet. 607; *Railroad Co. v. Bank of Ashland*, 12 Wall. 226.

By the law of Tennessee, where the note was executed, it is a valid obligation. In *Amis v. Kyle*, 2 Yerg. 31, the Supreme Court held that the statute of that state only prohibited labor and business in the "ordinary calling" of the parties; and that isolated private contracts, made by parties outside of their ordinary calling, are not invalidated. This rule was carried to a great length in the case cited. An obligation, to be discharged in horses, was made payable on the Lord's day, and the court held the contract valid, and that a tender of the horses, to have the effect of discharging the obligation, must be made on that day. This was held upon the ground that the sale and delivery of horses was not the ordinary calling of either of the parties. The attention of the court has not been

called to any later exposition of the law of that state than is contained in this decision, and it will be assumed that there is none.

Under the rule established in *Amis v. Kyle*, it is obvious the note, which is the foundation of this suit, was valid in Tennessee. The execution of a note for a pre-existing debt was probably not the ordinary calling of either of the parties. If it was, the burden of proof was on the defendant to show it: *Roy v. Johnson*, 7 Gray 162; *Bloxsome v. Williams*, 3 B. & C. 232. The doctrine of the Supreme Court of Tennessee is the doctrine of the early English cases under the statute of 29 Chas. II. c. 7, which prohibited labor only in the "ordinary calling of the parties: *Drury v. Defontaine*, 1 Taunt. 131; *Bloxsome v. Williams*, *supra*; *Rex v. Whitnash*, 7 B. & C. 596; *Fennell v. Ridler*, 5 Id. 406; *Rex v. Brotherton*, 2 Strange 702. It is also the doctrine of some of the American cases: *Hellams v. Abercrombie*, 15 S. C. 110; *Bloom v. Richards*, 2 Ohio St. 387; *George v. George*, 47 N. H. 27; *Hazard v. Day*, 14 Allen 487. Of course, the law of this state has no extra-territorial operation, and cannot affect the validity of contracts executed elsewhere on the Lord's day. And the general rule is that a contract valid by the law of the place where it is made is valid everywhere, and will be enforced by the courts of every other country. But there are exceptions to this general rule, and among them contracts against good morals, and that tend to promote vice and crime, and contracts against the settled public policy of the state, will not be enforced, although they may be valid by the law of the place where they are made: Story on Conf. of Laws, § 244; Westl. Int. Law, § 196; Whart. Conf. Laws, § 490.

The contention of the learned counsel for the defendant is that a court of this state ought not to enforce a contract made on the Lord's day in another state, though valid by the law of that state, because the contract is the result of an immoral and irreligious act, and its enforcement here would shock the moral sense of the community and violate the public policy of the state. Assuming, but not deciding, that the determination of this question must be the same in this court that it would be in a court of the state, we will proceed to inquire whether there is any principle upon which a court of the state could refuse to enforce the contract in suit.

The common law made no distinction between the Lord's day and any other day. Contracts entered into on that day were as valid as those made on any other day. The contract in suit was volun-

tarily entered into, between parties capable of contracting, for a lawful and valuable consideration. It had relation to a subject-matter about which it was lawful to contract, and was a valid contract when and where it was made. No court ought to refuse its aid to enforce such a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people. Vague surmises and flippant assertions as to what is the public policy of the state, or what would be shocking to the moral sense of its people, are not to be indulged in. The law points out the sources of information to which courts must appeal to determine the public policy of a state. The term, as it is often popularly used and defined, makes it an unknown and variable quantity, much too indefinite and uncertain to be made the foundation of a judgment. The only authentic and admissible evidence of the public policy of a state on any given subject are its constitution, laws and judicial decisions. The public policy of a state, of which courts take notice, and to which they give effect, must be deduced from these sources.

In *Vidal v. Girard's Ex'rs*, 2 How. 127, 198, it was objected by Mr. Webster that the foundation of the Girard College, upon the principles prescribed by the testator, was "derogatory and hostile to the Christian religion, and so is void as being against the common law and public policy of Pennsylvania." In replying to this argument the court said: "Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us." * * *

What is there, then, in the constitution, laws and decisions of this state evincing a public policy hostile to the enforcement of contracts lawfully made in other states on the Lord's day? The constitution of the state declares: "No human authority can, in any case or manner whatsoever, control or interfere with the right of conscience; and no preference shall ever be given by law to any religious establishment, denomination or mode of worship above any other. * * * No religious test shall ever be required of any person as a qualification to vote or hold office; nor shall any person be rendered incompetent to be a witness on account of his religious belief." Const. 1874, §§ 24, 26.

So much of the statute of the state as has any bearing on this

question reads as follows: "Sect. 1614. Every person who shall, on the Sabbath or Sunday, be found laboring, or shall compel his apprentice or servant to labor or perform other services than customary household duties of daily necessity, comfort or charity, on conviction thereof shall be fined one dollar for each separate offence."

* * * "Sect. 1617. Persons who are members of any religious society, who observe as Sabbath any other day of the week than the Christian Sabbath or Sunday, shall not be subject to the penalties of this act, so that they observe one day in seven, agreeably to the faith and practice of their church or society."

It is obvious the statute does not attempt to compel the observance of the first day of the week, as a day of rest, as a religious duty. It would be a nullity if it did so.

"In *Bloom v. Richards*, 2 Ohio St. 387, the court, THURMAN, J., delivering the opinion, said: "Thus the statute upon which the defendant relies, prohibiting common labor on the Sabbath, could not stand for a moment as a law of this state, if its sole foundation was the Christian duty of keeping that day holy, and its sole motive to enforce the observance of that duty."

And see, to the same effect, *Specht v. Commonwealth*, 8 Barr 312; *City Council of Charleston v. Benjamin*, 2 Strob. 508.

In this country legislative authority is limited strictly to temporal affairs by written constitutions. Under these constitutions there can be no mingling of the affairs of church and state by legislative authority. All religions are tolerated and none is established. Each has an equal right to the protection of the law, whether Christians, Jews or infidels: *Andrew v. Bible Society*, 4 Sandf. (N. Y.) 182; *Ayres v. Methodist Church*, 3 Id. 377; *Cooley Const. Lim.* 472. No citizen can be required by law to do, or refrain from doing, any act upon the sole ground that it is a religious duty. The old idea that religious faith and practice can be, and should be, propagated by physical force and penal statutes has no place in the American doctrine of government. Force can only effect external observances; whereas, religion consists in a temper of heart and conscious faith which force can neither implant nor efface. History records the mischievous consequences of all efforts to propagate religion, or alter man's relations to his Maker, by penal statutes. In religion no man is his neighbor's keeper, and no more is the state the keeper of the religious conscience of the people. The state protects all religions, but espouses none. Every man is

individually answerable to his God for his faith and his works, and must therefore be left free to imbibe and practice any faith he chooses, so long as he does not interfere with the rights of his neighbor. The statute, then, is not a religious regulation, but is the result of a legitimate exercise of the police power, and is itself a police regulation: *Slaughter-house Cases*, 16 Wall. 36, 62, and cases cited; *Bloom v. Richards*, *supra*; *Specht v. Commonwealth*, *supra*; *City of Charleston v. Benjamin*, *supra*.

Experience has shown the wisdom and necessity of having, at stated intervals, a day of rest from customary toil and labor for man and beast. It renews flagging energies, prevents premature decay, promotes the social virtues, tends to repress vice, aids and encourages religious teachings and practice, and affords an opportunity for innocent and healthful amusement and recreation. Neither man nor beast can stand the strain of constant and unremitting toil. Such a day, when designated by the state, is a civil and not a religious institution. No merely religious duty is enjoined. The statute does not require attendance on church, any more than it requires attendance to hear a lecture in support of infidelity. In point of lawfulness, there is no difference between an orthodox sermon and such a lecture on the Lord's day, in this state. The legislature might have required all persons to abstain from labor on the first or any other day of the week, without reference to their religious preferences or practices in that regard. But the statute of this state does not go to that length. While the law does not enforce religious duties and obligations as such, it has a tender regard for the conscience and convenience of every citizen in all matters relating to his religious faith and practice. The statute is catholic in its spirit, and accommodates itself to the varying religious faiths and practices of the people. In legal effect it declares every person must observe one day out of seven as a day of rest. But it does not attempt to bind all to the observance of the same day. Such a requirement would have the effect to compel many to observe two days of rest in each week, the statutory day and the day which their religious faith constrained them to observe. The statute designates the first day of the week as the day of rest for all who do not by reason of their religious faith and practice observe some other day. Christians, who regard the first day of the week as a sacred day; infidels, who regard no day as holy; and Friends, who hold there is no more holiness in one day than another, but

that all are to be kept holy, are by the statute constrained to desist from labor on the first day of the week. On the other hand, Jews and Seventh-day Baptists may pursue their ordinary callings on that day, if they observe the seventh day of the week according to their faith; and Mohammedans may labor on the first, if they observe the sixth day of the week according to their faith. The statute grants to all persons, who, in the exercise of their religious faith and practice, observe one day in the week as a day of rest, the liberty of working on every other day of the week, without qualification or limitation. In this respect there is a pronounced difference between the law of this and some of the other states.

In many other states but slight regard is shown to those who observe any other than the first day of the week as a day of rest. The New York statute provides: "Nor shall there be any servile working or laboring on that day, excepting works of necessity and charity, unless done by some person who uniformly keeps the last day of the week, called Saturday, as holy time, and does not labor or work on that day, and whose labor shall not disturb other persons in their observance of the first day of the week as holy time."

The New Jersey statute provides that it shall be a sufficient defence for working on the Sabbath day, that the defendant keeps the seventh day as the Sabbath: "provided, always, that the work or labor for which such person is informed against is done and performed in his or her dwelling-house or workshop, or on his or her premises or plantation, and that such work or labor has not disturbed other persons in the observance of the first day of the week as the Sabbath." And it has been held that whatever draws the attention of others from the appropriate duties of the Lord's day disturbs them. And where one purchased a horse and gave his note for the same, in his own house, in the presence of his wife, the seller, and one other person, whose religious feelings were not at all shocked, and who made no complaint, it was held to be "to the disturbance of others:" *Varney v. French*, 19 N. H. 233.

But the statute of this state draws no such invidious distinctions between those Christians who observe the first and those—be they Christians, Jews or Mohammedans—who observe "any other day of the week, * * * agreeably to the faith and practice of their church or society."

It is not true, therefore, that all contracts made in this state on the Lord's day are void. A large number of the citizens of the

state may lawfully labor and make contracts on that day. There can be no doubt of the validity of a note executed in this state on the Lord's day, when the parties to it refrain from labor on "any other day of the week, * * * agreeably to the faith and practice of their church or society." The validity of contracts made in this state on that day depends, therefore, on whether the parties to them conscientiously observe some other day of the week as a day of rest. If they do, their contracts made on the Lord's day are valid. Such contracts the courts of the state would be bound to enforce. If, then, it would be the duty of the courts of the state to enforce contracts made in the state between its own citizens on the Lord's day, having no relation to "household duties of daily necessity, comfort or charity," how can it be said that the public policy of the state forbids the enforcement of such contracts made in another state, and valid by the law of that state? A court cannot declare that the public policy of the state evinces such a high regard for the sacredness of the Lord's day as to forbid it to enforce a contract lawfully made on that day in another state, when it is bound by law to enforce contracts made on that day in its own state. It may be justifiable in private life to "assume a virtue, though you have it not;" but courts in the impartial administration of justice, are forbidden to assume a higher regard for the holiness of the Lord's day than is found in the constitution and laws of the state. To do so would deprive suitors of their rights without law, and would, besides, be in the highest degree pharisaical. And if the courts of the state would enforce contracts made on that day in the state between certain classes of her own citizens, how can the moral sense of the people of the state be said to be shocked by enforcing such contracts lawfully entered into elsewhere? No court is at liberty to impeach the constitution and laws under which it derives its jurisdiction and authority as a court, by assuming that what is lawful under them is shocking to the moral sense of the people who enacted them. But if no contracts made on that day in the state could be enforced, there would still be nothing in the objection that their enforcement would be too shocking to the moral sense of the community to be tolerated, for reasons forcibly stated by Judge REDFIELD, in delivering the opinion of the court in *Adams v. Gay*, 19 Vt. 358, 367: "And before we could determine that any given cause shocked the moral feelings of the community, we must be able to find but one pervading feeling upon that subject;

so much so, that a contrary feeling, in an individual, would denominate him either insane, or diseased in his moral perceptions. Now, nothing is more absurd to my mind, than to argue the existence of any such universal moral sentiment in regard to the observance of Sunday. It is in no just sense a moral sentiment at all which impels us to the observance of Sunday, for religious purposes, more than any other day. It is but education and habit, in the main certainly. Moral feeling might dictate the devotion of a portion of our time to religious rites and solemnities, but could never indicate any particular time above all others."

It is believed the moral sense of the community would esteem it a morally dishonest act for a debtor to refuse to pay a just debt because the evidence of it was executed on the Lord's day. Christians vary in their opinions of the manner in which the Lord's day ought to be kept. In continental Europe, sports, games and practices are freely indulged in on that day, with the approval of the church, which the larger number of Protestant churches of England and this country do not approve.

The large emigration from Europe to this country is having a marked influence on public opinion, particularly in towns and cities, as to how the Lord's day ought to be kept. The Puritan view of the question has undergone some modifications through this influence. As a result of less restricted views on the subject, in this city, in the shadow of the capitol there are more than half a hundred places where spirituous liquors are sold on Sunday, the same as any other day in the week, without molestation from the state or city authorities. It would be downright hypocrisy for a court to affect to believe that the moral sense of the community, which supports this condition of things, would be shocked by compelling a man to pay a note given for an honest debt because it was executed on the Lord's day. There may be a good many individuals who would feel so, but they do not constitute the community in the legal sense of that term.

It is an error to suppose that the Supreme Court of the state, in *Tucker v. West*, *supra*, held Lord's day contracts void on religious or moral grounds. That is not the ground upon which they are held void by any of the courts. The court held that the execution by the maker and the receipt by the payee of a promissory note was "labor," within the meaning of that word, as used in the statute.

It of course follows that the parties to a note executed on the

Lord's day incur the penalty of the statute against those who labor on that day, viz., a fine of one dollar. By reference to the statute it will be observed that it does not in terms prohibit labor, or declare contracts void. It simply denounces a penalty against those "found laboring." Here two familiar and established rules of decision come into play. One of these is, that a penalty implies a prohibition of the thing itself, on the doing of which the penalty is to accrue, though there are no prohibitory words in the statute; and the other is, that a court of justice will give no assistance to the enforcement of contracts which the law of the land has interdicted.

"The ground upon which courts have refused to maintain actions on contracts made in contravention of statutes for the observance of the Lord's day, is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction:" *Cranson v. Goss*, 107 Mass. 439; *Holman v. Johnson*, Cowp. 341; *Gibbs & Sterrett Manuf'g Co. v. Brucker*, 111 U. S. 597. There have been vigorous protests from time to time against the application of these principles to Lord's day contracts, upon the ground that they inflicted penalties, by judicial construction, out of all proportion to the offence, and not contemplated by the act (*Bloom v. Richards*, *supra*; and see remarks of GRIER, J., in *Philadelphia, W. & B. Railroad Co. v. Philadelphia & Havre de Grace S. B. Co.*, 23 How. 218); but the great weight of authority is that a contract made in violation of the Lord's day acts is void, like any other illegal and prohibited contract, and upon no other or different ground. And the reason that a contract made in this state on the Lord's day between persons "who observe as Sabbath any other day of the week" is not void, is that the statute expressly declares they "shall not be subject to the penalties of this act," and as there is no prohibition in terms in the statute, it results that there is neither penalty nor prohibition against such persons making contracts or performing any other kind of labor on the Lord's day. But if by the statute all contracts made in this state on the Lord's day were void, it is believed that the result in the case at bar would not be different.

There is often great difficulty in practice in drawing the line between the foreign contracts which may and may not be enforced. The rules defining the comity of states in this regard are necessarily general in their terms, and the adjudged cases are not quite uniform.

No case has been cited, and it is believed none can be found, holding that a contract made on the Lord's day in a state where such contracts are valid, will not be enforced by the courts of another state, by the laws of which such contracts are void. But there is one case at least (there may be others which our limited examination failed to discover) that holds that in such case the contract will be enforced. The case is entitled to consideration, no less on account of the uniform high character of the decisions of the court than the acknowledged learning and ability of the judge who delivered the opinion. In *Adams v. Gay*, *supra*, the precise question arose. A contract which, if it had been made in Vermont, would have been void under the Lord's day act of that state, was made in New Hampshire on the Lord's day. In a suit arising upon that contract in Vermont, the question arose whether the courts of that state would give it effect. The court refused to take judicial notice of the law of New Hampshire, and did not indulge the presumption that it was the same as that of Vermont. The court, Judge REDFIELD delivering the opinion, said: "The law of New Hampshire, then, being out of the case on account of its not having been proved at the trial, the contract between the parties is valid, unless it is void upon general principles of public policy, as being of evil example to our own citizens to see such a contract enforced in a court of justice."

And, after a full discussion of the subject, the court, on the assumption that the contract was valid in New Hampshire, held it valid in Vermont.

It has been decided that contracts for the purchase of lottery tickets, if valid where made, will be treated as valid and enforced in the courts of a state by the laws of which such contracts are illegal: *McIntyre v. Parks*, 3 Metc. 207; (in *Webster v. Munger*, 8 Gray 587, THOMAS, J., expresses the opinion that *McIntyre v. Parks*, was not rightly decided); *Kentucky v. Bassford*, 6 Hill 526. And the same doctrine has been maintained with reference to gambling contracts: Whart. Conf. Laws, §§ 487, 492.

This court is not to be understood as expressing any opinion as to the soundness of the doctrine of the cases last cited. They carry the doctrine of comity further than it is necessary to go to uphold the action in the case at bar. Lottery and gambling contracts are very generally regarded as inherently vicious and immoral, and wanting in a meritorious consideration, whenever and wherever

made. Whereas, the contract in suit was not only obligatory where made, but was made for a valuable and meritorious consideration; and the only objection to its validity is that it was executed on an inappropriate day of the week—a circumstance in which it would seem a state, other than that in which the contract was made, could have very little concern.

It has been held that when the law of the state where the contract was made, and the law of the state where the suit is brought, are the same, and a contract made on the Lord's day is void by the laws of both states, it will not be enforced; and that, in the absence of proof to the contrary, the law will be presumed to be the same in both states: *Hill v. Wilker*, 41 Ga. 449; *Sayre v. Wheeler*, 32 Iowa 559.

COMMON-LAW RULE.—As to the making of contracts, and all other acts not of a judicial nature, the common law made no distinction between Sunday and any other day: *Drury v. Defontaine*, 1 Taunt. 135; *Kepner v. Keefer*, 6 Watts 231; *Rex v. Brotherton*, Stra. 702; *Story v. Elliot*, 8 Cow. 27; *Fox v. Mensch*, 3 W. & S. 444; *Bloom v. Richards*, 2 Ohio St. 387; *Horace v. Keebler*, 5 Neb. 355; *Adams v. Gay*, 19 Vt. 365.

But in England and pretty generally in the United States, more or less stringent laws have been enacted, by which all ordinary labor and business are forbidden.

The principal English statute is that of 29 Car. II., c. 7, § 1. The language is: "that no tradesman, artificer, workman, laborer or other person whatsoever, shall do or exercise any worldly labor, business or work of their ordinary callings upon the Lord's Day, or any part thereof, (works of "necessity" and "charity" only excepted); and "that no person shall publicly cry, show forth, or expose to sale, any wares, merchandises, fruit, herbs, goods or chattels upon the Lord's Day or any part thereof." Very similar statutes have been enacted in this country.

WORKS OF NECESSITY AND CHARITY.

—Works of "necessity" and "charity" are excepted from the operation of Sunday statutes. And by a work of "necessity," is not meant a physical and absolute necessity, but any labor, business or work, which is morally fit and proper to be done on that day, under the circumstances of the particular case is a case of "necessity" within the statute. *Flagg v. Inhabitants of Millbury*, 4 Cush. 243.

In *McGatrick v. Wason*, 4 Ohio St. 567, the court held that works of "necessity" are not limited to labor for the preservation of life, health or property from impending danger. The "necessity" may grow out of, or indeed be incident to the general course of business, or even be an exigency of a particular trade or business, and yet be within the exception of the act. Thus the danger of navigation being closed, may make it lawful to load a vessel on Sunday, if there is no other time to do so.

The harvesting of "dead-ripe" wheat which could not be cut sooner, and which might be spoiled by rain if left until a later day, is a work of "necessity:" *Turner v. State*, 67 Ind. 595. A journey on Sunday to visit one's children who are properly away from home is not against the statute prohibiting travelling on that day: *McCearry v.*

Lowell, 44 Vt. 116; and a journey to procure medicine for a sick child is within the exception: *Gorman v. City of Lowell*, 117 Mass. 65.

Where a defect in a highway, for an injury occasioned by which to person or property the town would be liable, is found to exist on Sunday, it is the duty of such town to repair the defect immediately or to adopt measures to guard against the danger until such repairs can be made; and work, labor, or business for this work is "necessity" within the meaning of the statute: *Flagg v. Inhabitants of Millbury*, *supra*; see *Johnson v. Irasburg*, 47 Vt. 28. Raising subscriptions from a congregation on Sunday to pay off a church debt, or purchase a house of worship, is a work of "charity" within the statute, and subscriptions may be sustained: *Allen v. Duffie*, 43 Mich. 1; *Dale v. Knapp*, 98 Penn. St. 389.

A necessity may exist to work on Sunday to prevent a great waste of sap in making maple sugar: *Whitcomb v. Gilman*, 35 Vt. 297. The feeding of hogs on Sunday is a lawful work; and if, according to the circumstances of the particular case, the usual and proper means to feed, according to the practice of good husbandry, is to gather the necessary feed daily in the field, haul it to the feeding place and there feed it to them, such work is not unlawful: *Edgerton v. State*, 67 Ind. 588.

The running of passenger trains has been held a work of "necessity": *Commonwealth v. L. & N., &c., Ry. Co.*, 80 Ky. 291. And the forwarding of cattle by a railway company: *Phila., &c., Ry. Co. v. Lehman*, 56 Md. 209. See also *Commonwealth v. Sampson*, 97 Mass. 407; *Feital v. Middlesex Ry. Co.*, 109 Id. 398.

But the fact that one works gratuitously does not make it a work of "charity": *McGrath v. Merwin*, 112 Mass. 467. And in *State v. Goff*, 20 Ark. 289, it was held that where a person was too poor and had no implement

of his own with which to cut his grain, which was wasting from over-ripeness, could borrow none till Saturday evening, had swapped work with his neighbors during the week, hired a man to cut his own grain Sunday, it was not a work of "necessity."

A person cannot lawfully travel on Sunday for the purpose of supplying fresh meat to marketmen whom his master has agreed to supply therewith; although he could not do this in addition to his other work on Monday morning, and his master by reason of illness is unable to do it himself: *Jones v. Inhabitants of Andover*, 10 Allen 18.

One who travels on Sunday to ascertain whether a house which he has hired and into which he intends to move the next day, has been cleaned, is not travelling from "necessity": *Smith v. Boston & M. Ry.*, 120 Mass. 490; s. c. 21 Am. Rep. 538.

The cleaning up of a wheelpit on Sunday for the purpose of preventing the stoppage on a week day of mills which employed many hands, is not a work of "necessity" or "charity": *McGrath v. Merwin*, *supra*. And where a contract of hire of a horse and carriage on Sunday was indefinite as to time, distance and use, the carrying of a young lady home who had been attending a religious meeting during the day, will not render the contract legal: *Tillock v. Webb*, 56 Me. 100; and see *Patt v. Wright*, 30 Ind. 476.

"ORDINARY CALLING," "BUSINESS," &c.—All of the English cases carefully distinguish between contracts which are of the "ordinary calling" of the parties, and such as are not in the "ordinary calling." The former made upon Sunday are void; the latter not. This distinction is based upon the words of the English statute of Charles II., which prohibits only work of one's "ordinary calling." And contracts not within this prohibition have always been held valid there: *Drury v. Defontaine*, 1

Taunt. 131; *Fennell v. Ridler*, 5 B. & C. 406. Where the statute merely prohibits the exercise of business or work of one's "ordinary calling," one party cannot sue on the contract made by him on Sunday in the exercise of his ordinary calling, even if it be not within the "ordinary calling" of the other, and the parties meet on that day at the request of the latter: *Hazard v. Day*, 14 Allen 487. But where the contract is made in the "ordinary calling" of one party, the other may sue if it was not within his own "ordinary calling," and he did not know, when he entered it, that it was within the "ordinary calling" of the defendant: *Bloxsome v. Williams*, 3 Barn. & C. 232; s. c. 1 C. & P. 294.

The party seeking to impeach a contract because made on Sunday, must show that it was done by a person in the exercise of the business of his "ordinary calling:" *Mills v. Williams*, 16 S. C. 593; *Hellams v. Abercombie*, 15 Id. 110.

Where a farmer, a part of whose ordinary business was the purchase and cultivation of land, bought a tract of land on Saturday and agreed to consummate the trade on the next day, by signing the necessary papers, and did sign a note for the purchase money on that day; *held*, that the contract was illegal: *Morgan v. Bailey*, 59 Ga. 683.

The loaning of money on Sunday is "business," within the statute, and presumptively illegal: *Troewert v. Decker*, 51 Wis. 46. And the execution and delivery of a promissory note: *Allen v. Deming*, 14 N. H. 133.

Where a town board is authorized to issue bonds in aid of a railway, only upon the presentation of a petition therefor, signed by a certain number of taxpayers of the town, the procuring and affixing such signatures on Sunday, is "business" and is unlawful, and confers no authority upon the supervisors to issue bonds *De Forth v. Wis. &c., Ry.*, 52 Wis. 320.

But the execution of a mortgage is not

the exercise of one's "ordinary calling:" *Hellams v. Abercombie*, 15 S. C. 110. Nor is an agreement by an attorney to settle a client's affairs, by which he incurs personal responsibility, his "ordinary calling:" *Peate v. Dicken*, 5 Tyr. 116; s. c. 3 Dowl. P. C. 171. And a contract of hiring between a farmer and a laborer for a year and a day is valid: *Rex v. Whitnash*, 7 Barn. & C. 596. And in *Scarfe v. Morgan*, 4 Mees. & W. 270, it was held, that where a mare was sent to a farmer to be covered by his stallion, the case was held not to be within the statute prohibiting the exercise of one's "ordinary calling."

The simple making of a contract is not embraced in the prohibition of "common labor:" *Horace v. Keebler*, 5 Neb. 358; *Johnson v. Brown*, 13 Kan. 529; *Bloom v. Richards*, 2 Ohio St. 388.

WHEN CONTRACT DEEMED MADE ON SUNDAY.—In some of the New England States, Sunday, or the first day of the week, begins at sunset on Saturday evening and ends the same time the next day: 2 Bour. Dict. 559, 14th ed. In other parts of the United States, it commences at 12 o'clock on the night between Saturday and Sunday, and ends twenty-four hours later. See *Huidekoper v. Cotton*, 3 Watts (Pa.) 56; *Kilgor v. Miles*, 6 Gill & J. (Md.) 268.

In *Nason v. Dinsmore*, 34 Me. 391, it was held that a contract proved to have been made on Sunday is not thereby rendered invalid unless it be also proved that it was made before sunset. The presumption is that it was made on that part of the day on which it was lawful to do it: *Hiller v. English*, 4 Strobb. 486. In Connecticut, the Lord's day has been defined as continuing from daybreak to the closing of daylight on Sunday: *Fox v. Abel*, 2 Conn. 251; see, also, *Tracy v. Jenks*, 15 Pick. 465.

Where A. bought a quantity of shingles on Sunday, and at the same time gave a note for part payment, and he permitted the shingles to remain with the seller for

about a month, *Held*, that the contract was complete on Sunday, and void : *Allen v. Deming*, 14 N. H. 133.

A letter written Saturday, left by the writer on Sunday with a request to carry it to the post-office Monday, may be the medium of accepting a prior proposition from the person to whom it is addressed, and thus closing a lawful contract dating from Monday, the time when the letter was posted in pursuance of the Sunday request : *Bryant v. Booze*, 55 Ga. 439.

Where a contract for an exchange of horses, made on Saturday, included the discharge of a debt due from one of the parties to the other, but the purchaser of the horse took possession of it Sunday. *Held*, that there was such a consummation of the contract on Saturday as made it valid : *Peake v. Conlan*, 43 Iowa 297.

Where goods are selected and set apart and the prices agreed upon on Sunday, but, by the contract, they are not to be delivered till the next day, and they are not delivered till then, the transaction can not be avoided as a sale made on Sunday : *Rosenblatt v. Townsley*, 73 Mo. 536.

Payments made on Sunday and not returned, but allowed on a final accounting, will not avoid the contract on which they were received as one made in violation of the Sunday law : *Lamore v. Frisbie*, 42 Mich. 186.

WHAT CONTRACTS VOID. — The ground upon which courts have refused to sustain actions on contracts made in contravention of statutes for the observance of Sunday, is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction : *Cranson v. Goss*, 107 Mass. 439 ; *Ellis v. Hammond*, 57 Ga. 179. Each party is in *pari delicto*, and no relief can be granted because it was made by one of them in the exercise of his common avocation : *Berry v. Planters' Bank*, 3 Tenn. Ch. 69.

In Kansas, a contract made on any day to perform any kind of labor on Sunday, works of necessity, &c., excepted, is void ; but a contract made on Sunday to perform labor on any other day, is valid : *Johnson v. Brown*, 13 Kan. 529.

The owner cannot recover compensation for the use of a horse for a pleasure drive on Sunday : *Nodine v. Doherty*, 46 Barb. 59 ; *Stewart v. Davis*, 31 Ark. 518. In any case where the hiring is uncalled for, either by necessity or charity, the contract is void : *Whelden v. Chappel*, 8 R. I. 230 ; *Smith v. Rollins*, 11 Id. 464.

A common carrier's liability for carrying live stock is not lessened by reason of their being received or carried on Sunday : *Phila., &c., Ry. v. Lehman*, 56 Md. 209 ; see, also, *Opshal v. Judd*, 30 Minn. 126.

A contract for the sale and warranty of a horse on Sunday is void : *Fennell v. Ridler*, 5 B. & C. 405. And a loan of money on Sunday is void and cannot be enforced, whether in writing, verbal, or implied : *Meader v. White*, 66 Me. 90 ; *Finn v. Donahue*, 35 Conn. 216.

In *Day v. McAllister*, 15 Gray 433, it was held that a contract made in violation of the Sunday law is absolutely void.

A musician cannot recover for his services at a beer garden on Sunday : *Bernard v. Lüpping*, 32 Mo. 341.

An action will not lie for the conversion of a chattel, sold and delivered by the plaintiff to the defendant in exchange for another chattel on Sunday, and retained by defendant afterwards, notwithstanding the return by the plaintiff of the chattel for which it was exchanged and his demand for a corresponding return by defendant : *Myers v. Meinrath*, 101 Mass. 366.

The performance of any work on Sunday being expressly prohibited, any contract having for its consideration, or part of it, the doing of work on that day, cannot be enforced : *Slaze v. Arnold*, 14

B. Mon. 287; see *Pate v. Wright*, 30 Ind. 476; *Sumner v. Jones*, 24 Vt. 317; *Smith v. Sparrow*, 4 Bing. 84.

Where there is a contract to publish an "ad." in the Sunday edition of a paper for a year, it will not be presumed that the contract contemplated any labor to be done on Sunday: *Sheffield v. Balmer*, 52 Mo. 474. See *Nason v. Dinsmore*, 34 Me. 391. But in *Smith v. Wilcox*, 25 Barb. 341, it was held that a contract to publish an "ad." in a paper issued on Sunday is an agreement to do an act prohibited by the statute relative to servile labor on that day, and the price cannot be recovered. This case was affirmed in 24 N. Y. 353. But under the laws of 1871, such contracts are now legal.

The rescission of a contract is as much a matter of business as the making of it, and is void: *Benedict v. Bachelder*, 24 Mich. 425; 9 Am. R. 130. See *Meritt v. Robinson*, 35 Ark. 483.

A city ordinance which gives Jews the privilege of trading on Sunday, but denies it to others, is unconstitutional: *City of Shreveport v. Levy*, 26 La. Ann. 671.

But in *Johns v. State*, 78 Ind. 332, it was held that a statute against the desecration of the Sabbath, which provides that "nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as Sabbath," is not unconstitutional, as granting certain citizens privileges, &c., which shall not belong to all persons.

Sunday contracts are void, and the burden of proof showing that the case falls within some of the exceptions of the statutes, is on the party claiming it: *Sayre v. Wheeler*, 32 Iowa 559. See *Albrecht v. State*, 8 Tex. App. 313. Two joined in one complaint for doing work on Sunday may be jointly convicted, upon proof of a joint act in violation of the statute: *Commonwealth v. Sampson*, 97 Mass. 407.

(For instances of negotiable paper, Vol. XXXIII.—50

void because issued on Sunday, see subtitle "NEGOTIABLE PAPER," *infra*, p. 394.)

WHAT CONTRACTS VALID.—Where the contract is fully executed on Sunday, and the property passes, the sale is nevertheless valid: *Godfrey v. Greene*, 44 Me. 25.

A contract made on Sunday by the overseers of the town for the relief of a sick pauper, is valid: *Aldrich v. Inhabs. Blackstone*, 128 Mass. 148. And money paid on Sunday and retained afterwards, discharges debt: *Johnson v. Willis*, 7 Gray 164.

A deed though signed and acknowledged on Sunday, if delivered on another day is valid, whatever may be the effect on the acknowledgment: *Love v. Wells*, 25 Ind. 503.

A deed executed on Sunday cannot for that reason be avoided by a third party, who is a stranger to the transaction, claiming by a subsequent levy: *Greene v. Godfrey*, 44 Me. 25. And where a deed is executed on Sunday, but by the procurement of the grantor, dated upon the preceding day, he cannot assert the invalidity against a subsequent *bona fide* holder: *Love v. Wells*, *supra*.

In *Breitenman's Appeal*, 55 Penn. St. 183, it was held that any instrument which does not take effect till delivery is not void because signed on Sunday.

A will executed on Sunday is valid: *Bennett v. Brooks*, 9 Allen 118; *Breitenman's Appeal*, *supra*.

Bail-bond executed on Sunday is binding on the sureties: *Watts v. Commonwealth*, 5 Bush (Ky.) 309. And a bond void because issued on Sunday, may be used as an admission of a liability: *Lea v. Hopkins*, 7 Penn. St. 492.

An agreement to settle an action may be made on Sunday: *Shank v. Shoemaker*, 18 N. Y. 488. And the execution of a release by a creditor to an assignee, under a voluntary assignment, by delivery on Sunday is not void, not being labor, business or work of one's ordinary

calling: *Allen v. Gardiner*, 7 R. I. 22; see *Hazard v. Day*, 14 Allen 487; *Tucker v. West*, 29 Ark. 386.

A bill of sale of personal property, drawn and executed on Monday, is not void by reason of an account of stock having been taken on Sunday: *Luebbering v. Oberkoetter*, 1 Mo. App. 393.

And the fact that the indebtedness was for liquors sold on Sunday contrary to law, is no bar to an action on account stated, provided the account was not stated on Sunday: *Melchoir v. McCarty*, 31 Wis. 253.

The statute does not apply to the proceedings of business meetings of benevolent societies held on that day: *Corrigan v. Young Mens', &c., Society*, 65 Barb. 357.

A contract for the sale of property made upon Sunday, is not for that reason void. To bring a transaction within the statute which declares that no person shall expose for sale any wares, &c., on Sunday, clear proof of its violation must be produced. A private sale of property not "exposed to sale," is not within its provisions: *Eberle v. Mehrbach*, 55 N. Y. 682; see *Melvin v. Easly*, 42 N. C. 356.

If goods are sold and delivered to A. and B. on the Lord's day, the sale being induced by the false representations of A. on a previous day, and subsequently, not on Sunday, the seller demands the price of A., and he promises to pay it, this amounts to a sale to him, and he is liable for the price: *Winchell v. Carey*, 115 Mass. 560.

A contract for the transportation of property on Sunday is valid: *Merritt v. Earle*, 29 N. Y. 121; see *Carroll v. Staten Id. Ry. Co.*, 58 N. Y. 126.

In *Meriwether v. Smith*, 44 Ga. 542, the court said: "A clear distinction is made by the authorities between a suit to enforce a promise or undertaking entered into on Sunday, and a suit on a contract made on Sunday for work and labor, and for the doing anything, where

the thing to be done is *afterwards* performed by the party. It would be a fraud in one who has received the consideration of a contract on a week day, to set up the invalidity of the contract because made on Sunday. He reaffirms the contract by receiving the consideration." See *Dickenson v. Richmond*, 97 Mass. 45; *Blood v. Bates*, 31 Vt. 147. In order to render the contract void, it must appear that the party seeking to enforce it, had some voluntary agency in consummating it on Sunday: *Sargeant v. Butts*, 21 Vt. 99.

In *Dinsmore v. N. Y. Board of Police*, 12 Abb. N. C. 436, an injunction was granted to restrain the board of police from interfering with an express company's transportation of freight between states of the United States, but denied as to domestic matters, that is as to goods to be received and delivered within the city of New York: See *Adams Express v. N. Y. Board Police*, 65 How. Pr. 72.

NEGOTIABLE PAPER—WHEN VOID.—A promissory note, made on Sunday, is, as between the original parties, void. *Pope v. Linn*, 50 Me. 83; *State Cap. Bank v. Thompson*, 42 N. H. 369; *Bank of C. v. Mayberry*, 48 Me. 198. But if delivered on another day, it is valid: *Goss v. Whitney*, 24 Vt. 187; *King v. Fleming*, 72 Ill. 21; *Hilton v. Houghton*, 35 Me. 143; *Bank of C. v. Mayberry*, *supra*. But in *Parker v. Pitts*, 73 Ind. 597, it was held that the execution of a promissory note, as surety on Sunday, though delivered by the principal on a week day to the payee, who had no knowledge that the note had been so signed by the surety is void. See *Chrisman v. Tuttle*, 59 Ind. 155; *Saltmarsh v. Tuthill*, 13 Ala. 390.

The consideration of a note given for an injury done on the Lord's day to a horse and carriage hired on that day for any purpose than that of necessity or charity, is unlawful: *Tillock v. Webb*, 56 Me. 100.

A note made on Sunday is not void at

common law, and in a suit on a foreign note, any foreign statute invalidating it must be proved: *O'Rourke v. O'Rourke*, 43 Mich. 59.

And a note executed on Sunday is good in the hands of an innocent holder before maturity: *State Cap. Bank v. Thompson*, *supra*. And a bill of exchange under like circumstances is valid: *Begbie v. Levi*, 1 C. & J. 180. And a note signed and delivered on Sunday, but dated on week day, is valid in the hands of a *bona fide* holder without notice of the defect: *Bank of C. v. Mayberry*, *supra*; *Knox v. Clifford*, 48 Wis. 651; *Cranson v. Goss*, 107 Mass. 439; *Vinton v. Peck*, 14 Mich. 287; *Ball v. Powers*, 62 Ga. 757. The making and delivering on a secular day of a promissory note, dated to take effect on a subsequent Sunday, is not work or labor prohibited by the statute: *Stacy v. Kemp*, 97 Mass. 166.

It is no ground for arresting judgment in an action on a promissory note, that it bears date on Sunday: *Hill v. Dunham*, 7 Gray 543; see *Stevens v. Wood*, 127 Mass. 123.

SUBSEQUENT RATIFICATION.—The rule is that as between the parties a contract made in violation of the Sunday law, is void and is incapable of being ratified: *Pope v. Linn*, 50 Me. 83; *Day v. McAllister*, 15 Gray 433; *Stevens v. Wood*, 127 Mass. 123; see also *Parker v. Pitts*, 73 Ind. 598.

A contract for the transmission of a telegraph dispatch on Sunday is void, and the retention of the dispatch and the consideration paid by the sender does not constitute a ratification: *Rogers v. W. U. Tel. Co.*, 78 Ind. 169.

A Sunday horse trade can not be ratified on a week day; and if possession is given, the horse can be reclaimed, unless a new contract is made with mutual assent: *Winfield v. Dodge*, 45 Mich. 355. A note illegal because issued on Sunday is incapable of ratification: *Stevens v. Wood*, *supra*.

Part payments made on Sunday will not take a debt out of the statute of limitations: *Clapp v. Hale*, 112 Mass. 368. And a subsequent promise to pay a debt, whether express or implied if made on Sunday, does not take the debt out of the statute: *Bumgardner v. Taylor*, 28 Ala. 687. But *contra*, *Thomas v. Hunter*, 29 Md. 406; *Beardsley v. Hall*, 36 Conn. 270.

Where the terms of a contract only are agreed upon on Sunday, and subsequently executed it may be enforced: *Butler v. Lee*, 11 Ala. 885.

The mere fact that a person borrowing money retains and converts it to his own use, does not raise an implied promise binding in law. *Troewert v. Decker*, 51 Wis. 46. In *Bradley v. Rea*, 14 Allen 20, affirmed 103 Mass. 188, it was held that if a bargain is made on Sunday for the sale of goods, which are accordingly delivered and accepted by the purchaser on Monday, the vendor may maintain an action to recover the value of the goods, upon implied assumpsit; but the price fixed on Sunday will not be binding, nor will either be bound by any warranty made on that day. And in *Love v. Wells*, 25 Ind. 503, it was held that a contract void only because executed on Sunday constitutes an exception to the general rule that void contracts are not susceptible of ratification: *Sargeant v. Butts*, 21 Vt. 99. See *Van Hoven v. Irish*, 3 McCrary C. C. 443; *Heller v. Crawford*, 37 Ind. 279; *Melchoir v. McCarthy*, 31 Wis. 252.

Where a promissory note made by two, one of whom signed it on Sunday, was, on a subsequent day delivered by one of the makers to the payee who was ignorant of the fact that it had been signed on Sunday, it was held that such delivery was a subsequent ratification and made it valid: *King v. Fleming*, 72 Ill. 21. Where S. sold a horse to J. on Sunday, for which J. gave a note, and afterwards made two payments upon the note, and retained the horse without

offering to return the same, *Held* to amount to a ratification, and that S. was entitled to recover for the balance of the note: *Sumner v. Jones*, 24 Vt. 317. See also *Harrison v. Colton*, 31 Iowa 16; *Merrill v. Downs*, 41 N. H. 72.

TORT GROWING OUT OF SUNDAY CONTRACT.—The general principle is that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. Whether the form of action is in contract or in tort, the test in each case is whether, where all the parties are disclosed, the action appears to be founded in violation of law in which the plaintiff has taken part: *Hall v. Corcoran*, 107 Mass. 251. Thus, the sale or exchange of horses consummated on Sunday is void, and no action will lie on the warranty: *Finley v. Quirk*, 9 Minn. 195; *Murphy v. Simpson*, 14 B. Mon. 419; *Lyon v. Strong*, 6 Vt. 219; *Robeson v. French*, 12 Met. 24.

And a person who travels on Sunday in violation of the Lord's day act cannot maintain an action against a town for a defect in a highway, or against the proprietors of a street railway, in whose cars he is a passenger, for an injury to himself from their negligence, because his own fault in illegally travelling on the Lord's day necessarily contributed to the injury: *Bosworth v. Swasey*, 10 Met. 363; *Jones v. Andover*, 10 Allen 18; *Stanton v. Metropolitan Ry. Co.*, 14 Allen 485.

An action of tort will not lie, if to establish it the plaintiff requires aid from or is under the necessity of showing or depending upon an illegal Sunday contract: *Smith v. Rollins*, 11 R. I. 464; *Whelden v. Chappel*, 8 R. I. 230. And where the plaintiff sustained personal injuries from the negligence of the defendant while assisting them in their work on Sunday, it was held that his illegal act in working on Sunday was so inseparably

connected with the cause of action, as to prevent his maintaining the suit: *McGrath v. Merwin*, 112 Mass. 467; see also *Ladd v. Rogers*, 11 Allen 209; *Simpson v. Nicholls*, 3 Mees. & W. 240; *Gunderson v. Richardson*, 56 Ia. 56.

And in *Gregg v. Wyman*, 4 Cush. 322, it was held that if the owner of a horse knowingly lets him, on the Lord's day, to be driven to a particular place, but not for "necessity or charity," and the hirer injures the horse by immoderate driving, the owner cannot maintain an action against him for such injuries, although occasioned in going to a different place, and beyond the limits specified in the contract. But the case of *Gregg v. Wyman*, was directly overruled in *Hall v. Corcoran*, 107 Mass. 251.

Said the court: "It appears to us, upon principal and authority, that an action of tort for the conversion of a horse, by driving it beyond the place agreed in the illegal contract of letting and hiring, is not founded on that contract. And we think that it is equally clear, that the contract need not be shown by the plaintiff, and forms no part of his cause of action. * * * The wrong committed by the defendants, for which they are now sued, was not a breach of the illegal contract by which the plaintiff put his property into their hands; nor is the ground of this action an abuse of the possession which they had thus acquired by his consent, but is a direct invasion of the plaintiff's general right of property, wholly outside of any contract between the parties by the wrongful driving of the horse beyond the place agreed upon, and thus assuming control of the property for their own benefit, without any authority or license from the owner." The doctrine of the above case is sustained by *Woodman v. Hubbard*, 25 N. H. 67; *Mortan v. Gloster*, 46 Me. 520. But in *Parker v. Latner*, 60 Id. 528; s. c. 11 Am. R. 210, it was held that an action will not lie to recover damages arising from the immoderate driving of a

horse during a pleasure drive on the Lord's day, for which he was hired.

But if the hirer of a horse injures the property, or suffers it to be injured through his negligence, the owner may recover, although the contract be void : *Nodine v. Doherty*, 46 Barb. 59 ; see *Merritt v. Earle*, 29 N. Y. 121 ; *Carroll v. Staten Id. Ry. Co.*, 58 N. Y. 126 ; *Bertholf v. O'Reilly*, 8 Hun 16 ; affirmed 18 Abb. L. J. 389 ; *Stewart v. Davis*, 31 Ark. 518 ; see also, *Dodson v. Harris*, 10 Ala. 566.

If a person while unlawfully travelling

on Sunday is injured by a dog, the act of travelling is not a contributory cause of the injury, and he may recover : *White v. Lang*, 128 Mass. 598. And in *O'Shea v. Kohn*, a recent case in the New York Supreme Court, published in 17 Chicago Leg. News 15, Sept. 20, 1884, the court held that the law would not permit a person, by means of false representations, to obtain the goods or property of another and escape liability upon the fact that the wrong was perpetrated on Sunday.

CHARLES L. BILLINGS.

Chicago.

Supreme Court of California.

HAGERTY v. POWERS.

A parent who wilfully and negligently permits his son of eleven years of age to have in his possession a loaded pistol, whereby the boy injures the infant child of another, is not liable in damages therefor.

MYRICK, J., dissents.

IN banc. Appeal from the Superior Court of the county of Sacramento.

Grove L. Johnson and *Jones & Martin*, for appellant.

Elwood Bruner and *S. P. Scanaker*, for respondent.

The opinion of the court was delivered by

ROSS, J.—The question in this case is whether the defendant, who, according to the averments of the complaint, “wilfully, carelessly and negligently suffered, permitted, countenanced and allowed” his son of eleven years of age to have in his possession a loaded pistol, which pistol the boy afterwards so carelessly used and handled as to shoot the infant child of the plaintiff, is liable in damages therefor. We have been cited to no case, controlled by the principles of the common law, that holds that the action, under such circumstances, can be maintained. It seems, that under the civil law it may be ; and such an action was lately sustained by the Supreme Court of Louisiana, in the case entitled *Marionneaux v. Brugier*, reported in the sixteenth volume of the Reporter, page